BRIEF IN SUPPORT OF PETITION.

OPINIONS BELOW.

One opinion was delivered by the District Court (R. 80). It was written by District Judge, Honorable Ben Moore, and filed the 9th day of April, 1945. It appears on page 80 of the record and is reported in 60 F. Sup. 68. The opinion of the Circuit Court of Appeals was written by Honorable Morris A. Soper, Circuit Judge, and concurred in by Honorable Armistead M. Dobie, Circuit Judge, and Honorable Johnson J. Hayes, District Judge, and was filed and announced on the 12th day of December, 1945, and appears on page 137 of the record, and is reported in 152 F. (2d) 382.

JURISDICTION.

The jusisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347). The judgment of the Circuit Court of Appeals was entered on the 12th day of December, 1945 (R. 145). The petition for rehearing was filed on the 10th day of January, 1946 (R. 165). The final order denying rehearing was entered on the 5th day of February, 1946 (R. 165). The order staying the mandate for sixty days was entered on the 8th day of February, 1946, granting extension for filing petition for certiorari, the same being granted by Circuit Judge, Honorable Armistead M. Dobie (R. 165).

NATURE AND CHARACTER OF THE PROCEEDING.

This was an action brought by the Allemannia Fire Insurance Company of Pittsburgh, of the State of Pennsylvania, against The Board of Education of the County of Raleigh, of the State of West Virginia, and Winding Gulf Collieries a corporation, of the State of West Virginia, convening the defendants to that bill for the purpose of determining the proper distribution of the indemnity arising out of a matured fire insurance policy, the amount of which had theretofore been ascertained, and was paid into the registry of the District Court of the United States for the Southern District of West Virginia, to abide the decision of that Court. The District Court awarded the fund to petitioner (R. 76). Appeal was taken by The Board of Education of the County of Raleigh to the Circuit Court of Appeals, Fourth Circuit, and the decree of the District Court was reversed by that Court (R. 145). Petition for rehearing was filed in due course, and rehearing was denied (R. 165).

FOREWORD.

The facts have been set out sufficiently in the petition to fairly present the case and it would serve no good purpose to restate them here, yet such facts as may be necessary to present our position will be stated throughout the course of this brief. We will sometimes hereinafter refer to The Board of Education of the County of Raleigh, West Virginia, as The Board, and generally refer to Winding Gulf Collieries, as petitioner.

ARGUMENT.

At the very outset of this argument, to properly develop the questions presented by the petition, it is necessary that we direct the Court's attention specifically to the pertinent parts of the Statutes of West Virginia, printed in the Appendix to this brief.

The Statutory Standard Form of West Virginia Fire Insurance Contract.

In the exercise of its power of regulation, the Legislature of West Virginia enacted Section 7, of Article 4, of Chapter 33 of the Official Code of West Virginia (see statute in Appendix), prescribing the standard form of fire insurance policy, which can lawfully be used in West Virginia, and expressly prohibiting the use of any other form. The pertinent provision is in the following language:

> "No fire insurance company, its officers or agents, shall make, issue or deliver for use any policy, against loss by fire only, or the renewal of any such policy, on property in this State other than such as shall conform in all particulars as to blanks, size of type, context, provisions, agreements and conditions as set forth herein."

Immediately following this enacting clause, there is set out in the statute a complete form for a fire insurance contract. The applicable paragraph of the permissible form with which we are concerned is in the following words:

> "This entire policy shall be void, unless otherwise provided by agreement in writing added hereto, Ownership, etc. (a) if the interest of the insured

be other than unconditional and sole ownership; or (b) if the subject of insurance be a building on ground not owned by the insured in fee simple; * * * or (d) if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazards); or (e) if this policy be assigned before a loss."

The Enabling Section of the Statute.

Insurers having less than the sole and unconditional ownership of the subject of insurance, or in case of a building, non owners of the fee simple title of the land on which the building stands, can only insure within the scope of the enabling provisions of Section 8, of Article 4, of Chapter 33 of the Code of West Virginia (see statute in Appendix), which provides:

"No other or different provision, agreement, condition or clause shall be in any manner made a part of such contract or policy or indorsed thereon or added thereto or delivered therewith, except as follows, to-wit:

(a) * * *

(b) * * *

(c) There may be printed in the space indicated by the words 'space for description of property,' or added to the policy at such space by agreement in writing thereon or by rider attached thereto the following: (1) Descriptions and specifications, by schedule or otherwise, of the property covered by the policy; (2) *The extent of the application of in-*

surance under the policy; * * * (4) Any other matter necessary clearly to express all the facts and conditions of insurance on any particular risk. Provided, however, *That no such agreement or rider shall be inconsistent with or a waiver of any of the conditions or provisions of the standard fire insurance policy hereby established,* except that in the case of a mortgagee not named in the policy as the insured, such provisions may be added as shall not be inconsistent with or a waiver of any of the provisions of the said standard policy relating to mortgage interests, but if so added, shall include the provisions of a standard rider or indorsement relating to such interest the form of which shall have been approved by the insurance commissioner and filed in his office as hereinafter provided;"

(Emphasis our own)

The Statute of West Virginia Prescribing the Standard Form of Fire Insurance Policy is a Remedial Statute, Founded on Public Policy, and Those to Whom It Applies Will Not Be Permitted to Waive Its Provisions. The Statute Becomes a Part of the Contract and Prevails Over Stipulations of the Parties.

This statute adopts in West Virginia what has become generally and commonly known throughout the country as the New York Standard Form of Policy. It is of general and wide use and adopted by the Legislatures of the most of the states of the union, and where it has been adopted its use has uniformly been held to be compulsory, permitting such changes only as are authorized by the statute. It is the only form of fire insurance contract which may

lawfully be used in states so adopting the same, and while the statutory form does not prohibit the contracting parties from inserting in or attaching to the policy, terms or conditions, not found in the standard form, yet such terms or conditions cannot lawfully be inserted which are inconsistent with, or a waiver of any of the provisions of such standard form prescribed by the statute. So far as the conditions and provisions of the form go they are controlling and may not be omitted, changed or waived. The provisions of the standard form not only constitute the only permissible contract between the parties, but it is the law between the parties. The statute is founded on public policy. These statutes are universally construed to be remedial statutes, and mandatory in their provisions and they are liberally construed to compel performance with their provisions.[1]

The West Virginia Statute was in full force when the

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[1] Heim v. American Alliance Co. of N. Y., (Minn.) 180 N. W. 225.
Wild Rice Lumber Co. v. Royal Ins. Co., 99 Minn. 190, 108 N. W. 871.
Hronish v. Home Ins. Co., 33 S. D. 428, 146 N. W. 588.
Lawver v. Globe Mutual Ins. Co., 25 S. D. 549, 127 N. W. 615.
Hamilton v. Royal Ins. Co., 156 N. Y. 327, 50 N. E. 863, 42 L. R. A. 485.
Fidelity-Phenix Fire Ins. Co. v. School District No. 62 of Jackson County, (Okla.) 174 P. 513.
Palatine Ins. Co. v. Commercial Trust Co., (Okla.) 175 P. 930.
Northern Assurance Co. v. Grand View Bldg. Asso., 180 U. S. 308, 46 L. Ed. 213.
26 C. J., "Fire Insurance—Statutory Forms," Sec. 49, p. 57.

contract of insurance now in controversy was effected, and it clearly affects the construction and validity, as well as the permissible contracting provisions. These statutes become a part of the contract of insurance as fully and completely as if they had been written into the contract.[2]

Interpretation Sole Ownership Clause.

This form of policy has for many years been of general use throughout the United States. The sole ownership clause has frequently been drawn to the attention of the courts. In Cooley's Briefs on Insurance, Volume 3, at page 2171, the reason for this clause in an insurance policy is stated as follows:

> "The purpose in requiring the insured to have the sole and unconditional ownership of the insured property is to give protection only to those upon whom the loss insured against would inevitably fall, but for the insurance, and to avoid taking risks for those whose lack of interest, or whose contingent interest in the property might tend to encourage

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[2] Shinn v. West Virginia Insurance Co., 104 W. Va. 353, 140 S. E. 61.
State v. Wotring, 56 W. Va. 394, 49 S. E. 365.
Hicks v. Randich, 106 W. Va. 109, 144 S. E. 887.
Thomas v. Matthiessen, 232 U. S. 221, 58 L. Ed. 577.
State for use, etc. Finley Bros. Co. v. Freshwater, 107 W. Va. 210, 148 S. E. 6.
Tug River Lumber Co. v. Smithey, 107 W. Va. 482, 148 S. E. 850.
29 Am. Jur., "Insurance," Sec. 180, p. 197.
29 Am. Jur., "Insurance," Sec. 190, p. 206.
26 C. J., "Fire Insurance," Sec. 78, p. 81.

carelessness or wrongdoing in its use or preservation * * *; *and to prevent one who has an undivided or contingent, but insurable interest in property from appropriating to his own use the proceeds of the policy taken on the valuation of the entire and unconditional title, as if he were the sole owner, and to remove from him the temptation to perpetrate fraud and crime* * * *." (Emphasis our own)

This statute has been frequently enforced by the Supreme Court of West Virginia in a multiplicity of circumstances attending contracts of insurance.[3]

The Status of the Title and Ownership in the Instant Case.

The status of the title to the property involved in the instant case brings us squarely within the purview of the prohibited circumstances contemplated by the statute, and the paragraph of the standard form of policy quoted above. Every reason assigned for the statute by Mr. Cooley applies to our circumstances here with great force. The most that could be said for the title of The Board of Education for the County of Raleigh, to the insured building, in the instant case, is, that it held under its deed an exclusive right to the possession of the property, yet a limited exclusive right, a naked right to use the property for a specific purpose and none other. The Board could not convey the property, could not lease the property, nor could it

[3] Tyree v. Virginia Ins. Co., 55 W. Va. 63, 46 S. E. 706.
Kirk et al v. Queens Ins. Co., 126 W. Va. 213, 27 S. E. (2d) 596.
Hamlet v. American Fire Ins. Co., 107 W. Va. 687, 150 S. E. 7.

devote it to any use other than public free school purposes; the mere naked right to possession for the limited purpose as specified is all the right The Board had. All other rights to this property, including the right of reversion and the right to control the use of the property, was in petitioner; this was certainly the dominant title and estate, and it controlled the use and other attributes of ownership. Under such circumstances it is patent and apparent that The Board of Education could not lawfully, under these statutes, insure for its sole benefit, the whole title to the building destroyed. Under such circumstances it became necessary for the contracting parties to utilize the enabling section of the statute to render the policy a valid contract, indeed to enable them to effect any valid fire insurance upon the building for any indemnity at all.

Contracting Parties Presumed to Act Lawfully.

These statutes presented the limitation within which the contracting parties were compelled to contract, else their contract would be utterly and totally void. It is certainly not a violent presumption to presume that the contracting parties used language which they, at any rate, thought would conform with the statute. They were trying to make a lawful contract or to purposely and intentionally evade the statute. The latter intention will not be attributed to them unless the facts leave no other fair and rational conclusion; unless the language used will bear no other reasonable interpretation, they will be presumed to have intended to obey the law.[4] This is especially true as to the

[4] Chambers v. Cline, 60 W. Va. 588, 55 S. E. 999.
Great Northern Ry. Co. v. Delmar Co., 283 U. S. 686, 75 L. Ed. 1349.
Ewing et al v. Howard, 7 Wallace 499, 19 L. Ed. 293.

action of The Board of Education, its membership being sworn public officers.[5] It is a fair presumption also that they solemnly, carefully and advisedly selected words to serve their purpose, to make their contract both certain and lawful; this is what they were in fact trying to do, without evasion or attempted circumvention of the statute, within the scope of which they were contracting, and this is what they did.

Intention to Insure the Whole Title and Indemnify All Interested Parties—Analysis of the Contract.

The language used in the insurance contract by the contracting parties, must be construed in harmony with the statute, if it is susceptible of such construction.[6] At the very inception of the contract the assured is described as "The Board of Education of the County of Raleigh and legal representatives." It was apparent to the contracting parties that such a policy, simply naming The Board and legal representatives and covering buildings, "occupied for educational purposes * * * while located on premises * * * occupied, leased or used by the assured in Raleigh County, West Virginia," of which building The Board was not the sole and unconditional owner and did not own the land in fee simple, on which the building stood, as in the instant case, would be in conflict with the statute and totally and completely void. They were confronted with the

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[5] Board of Education of Hancock County v. Hartford Fire Ins. Co., 124 W. Va. 163, 19 S. E. (2d) 448.
Knox County v. National Bank City of N. Y., 147 U. S. 90, 37 L. Ed. 93.
20 Am. Jur., "Evidence," Sec. 187, p. 182.

[6] See authorities under Footnotes 1 and 2.

statutes with which they had to conform. The contracting parties realizing the contract would not be enforcible with the description of the assured as "The Board of Education of the County of Raleigh and legal representatives" alone, under the attending circumstances of the instant case, inserted a rider, as they could lawfully do under the statute and to accomplish this purpose, which rider was in the following words: "Assured The Board of Education of the County of Raleigh as is now or may hereafter be constituted for account of whom it may concern." (R. 26.) It is apparent that this rider was inserted in this contract pursuant to the West Virginia Statute and pursuant to the statute was intended to describe the scope and *extent of the insurance* as was required by the statute. The term used in the rider, "The Board of Education of the County of Raleigh as is now or may hereafter be constituted," did not materially change the scope and extent of the insurance from the original designation, "The Board of Education of the County of Raleigh and legal representatives." These phrases upon final analysis have substantially the same meaning. In the rider additional words were used. The words, "for account of whom it may concern," were inserted, and they must be given their meaning.[7] These

[7] Henderson Development Co. v. United Fuel Gas Co., 121 W. Va. 284, 3 S. E. (2d) 217.
Clayton et al v. Nicely et al, 116 W. Va. 460, 182 S. E. 569.
City Service Gas Co. v. Kelly-Dempsey & Co., 111 F. (2d) 247.
E. I. Du Pont De Nemours & Co. v. Claiborne-Reno Co., 64 F. (2d) 224, 89 A. L. R. 238.
Ehnes v. Hronis et ux, 127 N. J. L. 551, 23 A. (2d) 592.
Barbarsol Co. v. Leggett, (Ind.) 19 N. E. (2d) 481.
12 Am. Jur., "Contracts," Sec. 241, p. 772.

are words having a definite legal meaning and effect.[8] They are of ancient origin and frequent use in the insurance business. No better history of their origin or of the meaning attributed to them, can be found than that established by this Court in the case of Hagan v. Scottish Union & National Insurance Company. Since the decision in the Hagan case, it seems to have met with general approval and has become firmly established and followed by the text writers on insurance and the court generally. No authority, so far as we have been able to ascertain, has found fault or criticized that decision. Where words or terms, having a previously definite determined legal meaning and effect are knowingly and solemnly used in a written instrument, the parties thereto will be presumed to have intended such words or terms to have such previously determined mean-

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[8] Murdock v. Franklin Ins. Co., 33 W. Va. 407, 10 S. E. 777.

Hagan v. Scottish Union & Nat. Ins. Co., 186 U. S. 423, 46 L. Ed. 1229, affirming same v. same, 98 F. 129.

New Orleans & Southern American S. S. Co. v. Grace & Co., 26 F. (2d) 967, 969, certiorari denied 49 S. Ct. 33, 278 U. S. 636, 73 L. Ed. 552.

Hooper v. Robinson & Cox, 25 L. Ed. 318.

1 Phillips, Insurance, Sec. 385.

2 Duer, Marine Insurance, p. 28.

29 Am. Jur., "Insurance," Sec. 205, p. 214.

Cooley's Briefs on Insurance, Vol. 3, p. 2171.

Vance on Insurance, p. 421.

Joyce on Insurance, (2d) Vol. 2, Secs. 964, 966, p. 2053.

ing and effect.[9] It is apparent that the Circuit Court of Appeals attributed to the words, "for account of whom it may concern," no meaning and gave to the contract no more or different meaning than it would have, had the words, "The Board of Education of the County of Raleigh and legal representatives," or the words, "The Board of Education of the County of Raleigh as is now or may hereafter be constituted," alone, been used to describe the assured. This presents a parallel question of interpretation to that which was presented in the Hagan case, concerning it this Court said:

> "There is no doubt, and the district court so found, that Hagan intended by the policy to secure the insurance upon the entire title; and he therefore intended thereby to protect that title during the running of the policy, and when the clause is added in writing that it was issued on account of whom it may concern, it shows that he intended that such title should be protected in the hands of any person to whom he might transfer the same or any portion thereof. If otherwise, and the intention were only

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[9] Marguerite Coal Co. et al v. Meadow River Lumber Co., 98 W. Va. 698, 127 S. E. 644.
Langley v. Owen, 52 Fla. 302, 42 So. 457, 11 Ann. Cas. 247.
Rothchild v. Winthel, 191 Ind. 85, 131 N. E. 917.
In re American Steel Supply Syndicate, 256 F. 876, 879.
Heist et al v. Dunlap & Co., et al, 193 Ga. 462, 18 S. E. (2d) 837.
Fidelity & Casualty Co. of N. Y. v. Lowenstein, 97 F. 17.
12 Am. Jur., "Contracts," Sec. 238, p. 764.
26 C. J., "Fire Insurance," Sec. 76, p. 79.

to protect his own interest, the policy, as stated by the district judge, would naturally have been taken out in his own name, omitting the qualifying phrase, on account of whom it may concern. This phrase was put in for some purpose and such purpose was, as it seems to us, to protect the whole title without making it necessary to notify the company and obtain its consent to any transfer of interest."

The Words, "For Account of Whom It May Concern," Create a Trust Relationship.

The courts, both before and since the Hagan case, generally recognized that the phrase, "for account of whom it may concern," or words of like import, when used in a fire insurance policy, create a trust relationship between the named assured and the insurer and any other person holding an insurable interest in the subject of insurance. The Supreme Court of West Virginia recognizes this principle and has authoritatively declared it.[10] It is perhaps most clearly stated in Cooley's Briefs on Insurance, Volume 2, page 1265. Mr. Cooley, upon analysis of the principles enunciated in the Hagan case, so interprets that case and states the principle in the following language:

"Principles similar to those controlling the insurance of property 'held in trust' govern also insurance 'for account of whom it may concern.' Such a policy will not be confined to the interest of the insured, but may cover the interests of the owners, and may be adopted by them, even after the loss."

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[10] Murdock v. Ins. Co., 33 W. Va. 407, 10 S. E. 777.
Sheppard v. Peabody Ins. Co., 21 W. Va. 368.
Lucas v. Ins. Co., 23 W. Va. 258.

Prohibitive Statutory Provisions Prevail Over Conflicting Contractual Stipulation.

We are not unmindful of other special provisions in the contract of insurance in controversy, which were stressed by the Circuit Court of Appeals. We recognize the fact that in the rider heretofore discussed, this language appears: "Loss, if any, under this policy shall be adjusted with and held payable to The Board of Education of the County of Raleigh." Other provisions under the title, "Special Provisions," quoted and relied upon by the Circuit Court of Appeals in its decision, are:

> "* * * The Board of Education of the County of Raleigh as is now or may hereafter be constituted shall be deemed the owner of the property herein named, described and covered by this policy, and no defect in the title to such property shall invalidate this policy in whole or in part.
>
> Should any of the within described property be situate on lands not owned by the assured in fee simple, this insurance shall not be affected thereby."

If the contracting parties, by use of this language, have attempted to enter into a contract of insurance, pursuant to which the interest *only* of the Board of Education was insured, and *none other*, then this language can have no force or effect for the reason that it would contravene the express prohibitive statute.

Section 8, of Article 4, of Chapter 33 of the Code of West Virginia, in subdivision (c)-(4), prescribes "that no such agreement or rider shall be inconsistent with or a waiver of any of the conditions or provisions of the standard fire insurance policy hereby established."

It is perfectly patent that if it were not for the saving clause, "for account of whom it may concern," the above quoted language of the contract, standing alone, would be in direct conflict with the paragraph of the standard form of policy prescribed by the West Virginia Statute, hereinbefore quoted, thereby invalidating the whole policy for the reason that the assured was not the sole and unconditional owner of the subject of insurance and which subject of insurance stood on lands not owned by the named assured in fee simple.

Under such circumstances, it is axiomatic that the existing and statutory provisions enter into and form a part of the contract of insurance and are applicable as fully as if such provisions were written into the contract, and that the statute will prevail and have precedence over the language used by the contracting parties. If the words, "for account of whom it may concern," are ignored, it is clear that the whole contract of insurance is in conflict with the statute and for that reason totally and completely void. The words, "for account of whom it may concern," must be given full force and effect, they must be given the definite legal meaning which the authorities attribute to them. When used in the insurance policy, in the juxtoposition in which they are placed in the instant case, they mean, The Board of Education of the County of Raleigh, "as well in its own name as for and in the name (without specification) of all and every other person and persons to whom the same (the property insured) doth, may, or shall appertain in part or in all." Hagan v. Scottish Union & National Insurance Company, supra. If these words are given this meaning, or meaning of like import, then the above quoted language can be given lawful force and effect to clearly demonstrate an intention to insure the whole title to the

destroyed building and to protect every specie of property therein and every person having an insurable interest therein, and thereby render this contract of insurance a lawful contract, and in complete compliance with this statute.

The Opinion of the Circuit Court of Appeals Overrides Both the Statute and the True Legal Meaning of the Language Used in the Contract.

The Circuit Court of Appeals gave to the words, "for account of whom it may concern," no meaning whatsoever. The construction of the contract adopted by the Circuit Court of Appeals, reads these words out of the policy. The Court, in the course of its opinion, says:

> "The phrase, 'for account of whom it may concern,' was doubtless used in the policy to make doubly certain that in case of loss the proceeds of insurance would be payable to the public authorities charged with the maintenance of the schools, whoever they might be and by whatever name they might then be known."

The public authorities were limited under the law to one of two things, (a) to insure and limit the indemnity to the interest alone which it had in the subject of insurance, or (b) to insure, as it did, the whole title and constitute itself a trustee of the indemnity for account of whom it might concern. Neither the named public authority or the supposed public authority, referred to by the Circuit Court of Appeals, owned in fee simple the land on which the subject of insurance was built, nor were they the sole owners of the subject of insurance. Simply because the named assured, or its successors, were public authorities, did not enable

them to violate the statute. If the Circuit Court of Appeals has correctly stated the object and purpose of the contracting parties, according to the true intent, spirit and meaning of their contract, then we submit, in the light of the statute, that the effect of that decision is to give force and effect to a contract unlawfully made and which the contracting parties were expressly forbidden to make, thus ignoring both the statute and the words used in the contract.

In this connection, we submit that the construction given to the contract by the Circuit Court of Appeals establishes a meaning for the contract the same as if the words, "for account of whom it may concern," had not been used at all. The named assured in this contract, as we have heretofore pointed out, was "The Board of Education of the County of Raleigh and legal representatives." The named assured in the rider to the policy was "The Board of Education of the County of Raleigh as is now or may hereafter be constituted." We submit that these two descriptions of the named assured, used in this contract of insurance, fully comprehend, by plain and unmistakable language, "the public authorities charged with the maintenance of schools, whoever they might be and by whatever name they might then be known." Why were the words, "for account of whom it may concern," used at all? They are in the contract, they have legal meaning, as we have seen, will not this legal meaning be attributed to them, or are these words to mean absolutely nothing? Is no intention to be attributed to the contracting parties from the use of these words, when they are of such frequent and ancient use and to which such uniform meaning has heretofore been given to them by the courts of this land, and especially by the highest judicial tribunal in the nation? We cannot but feel that

to so construe this contract is arbitrary and without justification in the light of the law and facts attending the contracting parties at the time the contract was made.

The Circuit Court of Appeals Adopted Erroneous Factual Premise—The Authorities Relied On Do Not Apply.

We challenge the factual premise on which the Circuit Court of Appeals based its decision. Its decision, as we have endeavored to demonstrate, fails to take cognizance of the Statutes of West Virginia and the material provisions of the instant contract and the facts and circumstances attending its execution and having done so relied and bottomed its decision on authorities having no application to the instant case.[11] We find no fault with the principle of law enunciated in these cases, they are cases of the general rule of insurance contracts, with a single named assured, with nothing appearing in the contract indicating an intention to protect any other person. Cooley's Briefs on Insurance, Volume 2, page 1282, expresses the general rule and its exception in this language:

> "The general rule is that a policy made in the name of a particular person will not protect the interest of any other person, unless the words "for whom it may concern," or their equivalent, indicate that it is intended that the interest of some other person be covered."

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[11] Thompson v. Gearheart, 137 Va. 427, 119 S. E. 67.
Harrison v. Pepper, 166 Mass. 288, 44 N. E. 222.
Clements v. Clements, 167 Va. 223, 188 S. E. 154.
In re Gorman's Estate, 321 Pa. 292, 184 Atl. 86.

The Words, "For Account of Whom It May Concern," Used in An Insurance Contract, Are Technical in Their Meaning And Comprehend Every Species of Property Held in the Res or Subject of Insurance, and When the Subject of Insurance is Real Estate, These Words Convert the Policy Into a Covenant Real and the Indemnity Follows the Title.

In the instant case the form of the policy used by the contracting parties was designed to cover every specie, title or interest held by all persons in the property covered by the policy, and to constitute The Board a trustee of the funds over and above its own indemnity, payable under it, for the benefit of all persons having any insurable interest in the property covered by the policy. The policy, as thus written, has two aspects. It establishes a legal status between The Board and the insurance company on the one part, and an equitable relation between The Board and the associate owner of the insured property on the other. The contract, when so construed, is enforceable against the insurance company for the whole value of the destroyed property, regardless of title or ownership, and as so construed, conforms to and is in complete harmony with the Statutes of the State of West Virginia. Such a construction saves this contract of insurance from invalidity on account of its being a *speculative policy* and on account of its violation of the principles of indemnity firmly fixed by the Statutes of West Virginia and the decisions of its highest court. This construction prevents this contract from being a mere gambling contract. That such a contract, construed as the Circuit Court of Appeals construed it, violates public policy and is void in its entirety, is demonstrated by the very language of the statute. The words, "for account of whom it may concern," were advisedly used in this policy for the very purpose of avoiding illegality or violating the

statute and the public policy of the State of West Virginia. With this language and this construction the policy remains a contract of indemnity, indemnity to The Board and indemnity to all persons having title or insurable interest in the subject covered by the policy. The contract of insurance having accomplished the purpose intended, by denying the insurance company of its legal defense under the sole ownership paragraph of the standard form, thus compelling the insurance company to pay the whole cash value of the destroyed building into court, should now be enforced, and The Board should be estopped from denying its trusteeship in the fund. According to the true intent, spirit and meaning of this contract, as construed by the highest courts in this nation, the indemnity now stands in the place of the building and follows in its distribution the title to the property destroyed.[12]

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[12] Hagan v. Scottish Union & National Ins. Co., 186 U. S. 423, 22 S. Ct. 862, 46 L. Ed. 1229.
Miltenberger v. Beacom, 9 Pa. St. 198.
Clyburn v. Reynolds, (S. C.) 9 S. E. 973.
Green v. Green, (S. C.) 27 S. E. 952.
Haxall's Ex'ors. v. Shippen, (Va.-1839) 10 Leigh 536, 34 Am. R. 745.
Culbertson v. Cox, 29 Minn. 309, 43 Am. R. 204, 13 N. W. 177.
Brough v. Higgins, 2 Gratt. 408, 19 Va. R. A. 423.
Crisp Co. Lumber Co. v. Lee Bridges, 187 Ga. 484, 200 S. E. 777.
Clark v. Leverett, 159 Ga. 487, 126 S. E. 258.
Welch v. London Assurance Corp. (Pa.) 151 Pa. St. 607, 25 Atl. 142.
Sampson v. Grogan, (R. I.) 42 Atl. 712, Opinion of the Court, 717.
Joyce on Insurance, (2d) Vol. 2, Secs. 964, 966, p. 2053.
Vance on Insurance, Sec. 148, p. 421.

Where Real Estate is Insured in the Comprehensive Terms Used in the Instant Policy and the Property is Involuntarily Destroyed, and the Policy Matures, Equity Will Reconvert the Indemnity Into Realty to Protect the Interests of the Different Owners of the Subject Insured, and the Money Will Stand in the Place of the Building and Be Held by Each Owner as of His Former Estate.

This principle is well recognized throughout the United States and is as old, and yet beneficial, in its operation as the jurisdiction of courts of equity. It has been utilized in every conceivable involuntary conversion of real estate into personal property, whether the involuntary conversion be under a decree of a court, the administration of estates under power of personal representatives, sales under trust deeds or trespass to real estate.[13] Some of these are cases of constructive trust, but here we have a case of express trust, expressed by the very language used

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[13] Findley v. Findley, 42 W. Va. 372 (conversion judicial sale), 26 S. E. 443.
Hawes v. Lathrop, 38 Cal. 493 (conversion of insurance fund).
Chase v. Swayne, 88 Tex. 218, 53 Am. St. R. 742, (homestead destroyed by fire).
McCoy v. Ferguson, 249 Ky. 334, 60 S. W. (2d) 931 (condemnation conversion).
Green v. Green, 50 S. C. 514, 27 S. E. 952 (conversion fire loss).
Brough v. Higgins, (Va.) 2 Gratt. 408.
Haxall's Ex'ors. v. Shippen, (Va.-1839) 10 Leigh 536, 34 Am. R. 745 (conversion fire loss).
19 Am. Jur., "Equitable Conversion," Sec. 19, p. 18.
4 Pomeroy's Eq. Jur., (5th Ed.) Sec. 1168, pp. 499-500.

in the contract of insurance.[14] It is not infrequent in its application to indemnity arising out of matured fire insurance policies, in cases where the language of the policy will warrant it. Thus where the policy is payable to the named assured, his heirs or personal representatives and the policy matures after death of the named assured and by will the insured estate is split,[15] and in the case of reversioner not in possession who insures the whole estate, his own interest, as well also as the life estate, a trust in the indemnity arises for the use and benefit of the whole estate.[16] Still other cases in jurisdictions recognizing the doctrine of trust relationship between the life tenant and the remainderman, and either insures the whole estate, the indemnity is reconverted into realty and becomes a trust.[17] Where property is conveyed to trustees for a particular purpose, with reversion upon failure of use, and the purpose fails, after the trustees erect the building, and the property in the meantime is destroyed by fire, the money will be converted into realty and follow the title upon reversion.[18] The lan-

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[14] Cooley's Briefs on Insurance, Vol. 2, p. 1265.
2 Barton's Chancery Practice, (2d) Sec. 290, p. 958.

[15] Haxall's Ex'ors. v. Shippen, (Va.-1839) 10 Leigh 536, 34 Am. Rep. 745.
Culbertson v. Cox, 29 Minn. 309, 13 N. W. 177.

[16] Brough v. Higgins, et al, (Va.-1846) 2 Gratt. 408.

[17] Clyburn v. Reynolds, (S. C.) 9 S. E. 973.
Green v. Green, (S. C.) 27 S. E. 952.
Crisp Co. Lumber Co. v. Lee Bridges, 187 Ga. 484, 200 S. E. 777.
Clark v. Leverett, 159 Ga. 487, 126 S. E. 258.

[18] Hawes v. Lathrop, 38 Cal. 493.

guage in the instant policy or contract of insurance is clear and unmistakable, when read in the light of the attending circumstances at its execution, and by previous judicial determination, by this Court, the words used undoubtedly constitute the indemnity a trust fund for the benefit of whomsoever the loss insured against, would inevitably fall, but for the insurance, and thus avoid one having but a mere right to possession for a special purpose appropriating to its sole use the proceeds of the policy as if taken in its name alone, on the valuation of the entire and unconditional title as if it were the sole owner, and by so doing convert a catastrophe into a blessing.

CONCLUSION

Your petitioner respectfully submits that the final determination by this Court of the questions of law involved in the interpretation of insurance contracts, is of the utmost importance to the rights of contracting parties in relation to insurance, so frequently and necessarily contracted in the form utilized in the instant case; as a practical matter such contracts are universally made upon forms, with riders attached, couched in previously determined legal meaning and decisions of this Court so construing such riders tends to establish a uniformity of construction throughout the United States.

The decision of the Circuit Court of Appeals herein is not only contrary to the law, as announced by this Court in its earlier decisions, and the holdings of the Supreme Court of West Virginia, but it is contrary to the express Statutes of West Virginia, applicable to cases of this character, and gives to the contract a construction and meaning

which it was the clear intent, spirit and purpose of the statutes to prohibit and avoid.

Unless the error in this decision be corrected by this Court, the effect will be to create widespread and regrettable confusion, arising out of the conflict of this decision with applicable statutes of West Virginia and the similar statutes of other states, which have adopted the New York Standard Form of Fire Insurance Policy, which contracts are so frequently and generally used and necessary to the proper conduct of modern commerce in general, and which are of the utmost importance in the proper administration of insurance business generally.

Respectfully submitted,

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APPENDIX

The pertinent provisions of the West Virginia Statute, Sections 7 and 8, of Article 4, of Chapter 33, of the Official Code of West Virginia, (Michie's Code, Serial Sections 3366 and 3367), which we deem to be helpful to the Court in arriving at a conclusion in this case, are as follows:

"Sec. 3366. (7) *Form of Fire Policies.*—No fire insurance company, its officers or agents, shall make, issue or deliver for use any policy against loss by fire only, or the renewal of any such policy, on property in this State other than such as shall conform in all particulars as to blanks, size of type, context, provisions, agreements and conditions as set forth herein.

No.....

(Space for insertion of name of company or companies issuing the policy and other matter permitted to be stated at the head of the policy.)

Amount $..... Rate..... Premium $.....

In consideration of the stipulations herein named and of .....dollars premium does insure..... and legal representatives, to the extent of the actual cash value (ascertained with proper deductions for depreciation) of the property at the time of loss or damage, but not exceeding the amount which it would cost to repair or replace the same with material of like kind and quality within a reasonable time after such loss or damage, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair and without compensation for loss resulting from interruption of business or manufacture, for the term of

.....from the.....day of.....19..., at noon, to the.....day of....., 19..., at noon, against all direct loss and damage by fire and by removal from premises endangered by fire, except as herein provided, to an amount not exceeding..... dollars to the following described property while located and contained as described herein, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from fire, but not elsewhere, to-wit:

(Space for description of property.)

This policy is made and accepted subject to the foregoing stipulations and conditions, and to the stipulations and conditions printed on the back hereof, which are hereby made a part of this policy, together with such other provisions, stipulations and conditions as may be indorsed hereon or added hereto as herein provided.

In Witness Whereof, this company has executed and attested these presents.

(Space for date and for signatures and titles of officers and agent.)

Fraud, misrepresentation, etc. This entire policy shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

Uninsurable and excepted property. This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money, notes or securities; nor, unless

specifically named heron in writing, bullion, manuscripts, mechanical drawings, dies or patterns.

Hazards not covered. This Company shall not be liable for loss or damage caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises.

Ownership, etc. This entire policy shall be void, unless otherwise provided by agreement in writing added hereto, (a) if the interest of the insured be other than unconditional and sole ownership; or (b) if the subject of insurance be a building on ground not owned by the insured in fee simple; or (c) if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property insured hereunder by reason of any mortgage or trust deed; or (d) if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard); or (e) if this policy be assigned before a loss.

Other insurance. **Increase of hazard.** **Repairs, etc.** Unless otherwise provided by agreement in writing added hereto this Company shall not be liable for loss or damage occurring, (a) while the insured shall have any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or (b) while the hazard is increased by any means within the control or knowledge of the insured; or (c) while mechanics are employed in

building, altering or repairing the described premises beyond a period of fifteen days; or (d) while illuminating gas or vapor is generated on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises fireworks, greek fire, phosphorus, explosives, benzine, gasoline, naphtha or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels; or (e) if the subject of insurance be a manufacturing establishment while operated in whole or in part between the hours of ten P. M. and five A. M., or while it ceases to be operated beyond a period of ten days; or (f) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of ten days; or (g) by explosion or lightning, unless fire ensue, and, in that event, for loss or damage by fire only.

Explosives, gas, etc.

Factories.

Unoccupancy.

Explosion, Lightning.

Chattel mortgage. Unless otherwise provided by agreement in writing added hereto this Company shall not be liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage, and during the time of such encumbrance this Company shall be liable only for loss or damage to any other property insured hereunder.

Fall of building. If a building, or any material part thereof, fall except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

Added Clauses. The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss or damage, and any other agreement not inconsistent with or a waiver of any of the conditions or provisions of this policy, may be provided for by agreement in writing added hereto.

Waiver. No one shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement added hereto, nor shall any such provision or condition be held to be waived unless such waiver shall be in writing added hereto, nor shall any provisions or condition of this policy or any forfeiture be held to be waived by any requirement, act or proceeding on the part of this Company relating to appraisal or to any examination herein provided for; nor shall any privilege or permission affecting the insurance hereunder exist or be claimed by the insured unless granted herein or by rider added hereto.

Cancellation of policy. This policy shall be cancelled at any time at the request of the insured, in which case the Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by the Company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Pro rata liability. This Company shall not be liable for a greater proportion of any loss or damage

than the amount hereby insured shall bear to the whole insurance covering the property, whether valid or not and whether collectible or not.

Noon. Mortgage interests.

The word "noon" herein means noon of standard time at the place of loss or damage. If loss or damage is made payable, in whole or in part, to a mortgagee not named herein as the insured, this policy may be cancelled as to such interest by giving to such mortgagee a ten days' written notice of cancellation. Upon failure of the insured to render proof of loss such mortgagee shall, as if named as insured hereunder, but within sixty days after notice of such failure, render proof of loss and shall be subject to the provisions hereof as to appraisal and times of payment and of bringing suit. On payment to such mortgagee of any sum for loss or damage hereunder, if this Company shall claim that as to the mortgagor or owner, no liability existed, it shall, to the extent of such payment be subrogated to the mortgagee's right of recovery and claim upon the collateral to the mortgage debt, but without impairing the mortgagee's right to sue; or it may pay the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreements in writing.

Requirements in case of loss.

The insured shall give immediate notice in writing, to this Company, of any loss or damage, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, stating the quantity and cost of each article and the amount claimed thereon; and,

the insured shall, within sixty days after the fire, unless such time is extended in writing by this Company, render to this Company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: The time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof and the amount of loss or damage thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish a copy of all the descriptions and schedules in all policies and if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal. In case the insured and this Company shall fail to agree as to the amount of loss or damage, each shall, on the written demand of either, select a competent and disinterested appraiser. The appraisers shall first select a competent and disinterested

umpire; and failing for fifteen days to agree upon such umpire then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property insured is located. The appraisers shall then appraise the loss and damage stating separately sound value and loss or damage to each item; and failing to agree, shall submit their differences only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's options. It shall be optional with this Company to take all, or any part, of the articles at the agreed or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required; but there can be no abandonment to this Company of any property.

Abandonment.

When loss payable. The amount of loss or damage for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss or damage is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Suit. No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity unless all the require-

ments of this policy shall have been complied with, nor unless commenced within twelve months next after the fire.

Subrogation. This Company may require from the insured an assignment of all right of recovery against any party for loss or damage to the extent that payment therefor is made by this Company.

Standard Fire Insurance Policy of the State of West Virginia

Expires .....
Property .....
Amount - - - $.....
Premium - - - $.....
.....
No.....

It is important that the written portions of all policies covering the same property read exactly alike. If they do not they should be made uniform at once. (1907, c. 77, sec. 68; Code 1923, c. 34, sec. 68; 1923, c. 18, sec. 68.)

Sec. 3367. (8) *Additional Matter Which May Be Inserted In Fire Policy.*—No other or different provision, agreement, condition or clause shall be in any manner made a part of such contract or policy or indorsed thereon or added thereto or delivered therewith, except as follows, to-wit:

(a) There may be printed at the head of said policy in the space indicated by the words "space for insertion of name of company or companies issuing the policy and other matter permitted to be stated at the head of the policy" the name of the company, or companies, issuing the policy;

the location and place of business thereof; the date of incorporation or organization thereof; whether said company, or companies, are stock or mutual corporations; and such device or devices as the company, or companies, issuing said policy shall desire;

(b) There may be printed at the end of the first page of said policy in the space indicated therefor by the words "space for date and for signatures and titles of officers and agent," the names and titles of the officers executing and attesting the policy and the words "but this policy shall not be valid until countersigned by the duly authorized agent of the company at....." (or the "manager" in place of the word "agent") and the words "countersigned at.....this .....day of.....," followed by a blank space for the signature of such duly authorized agent or manager, and the word "agent" or "manager";

(c) There may be printed in the space indicated by the words "space for description of property," or added to the policy at such space by agreement in writing thereon or by rider attached thereto the following: (1) Descriptions and specifications, by schedule or otherwise, or the property covered by the policy; (2) The extent of the application of insurance under the policy; (3) The extent of the contribution to be made under the policy in case of loss or damage; (4) Any other matter necessary clearly to express all the facts and conditions of insurance on any particular risk. Provided, however, That no such agreement or rider shall be inconsistent with or a waiver of any of the conditions or provisions of the standard fire insurance policy hereby established, except that in the case of a mortgagee not named in the policy as the insured, such provisions may be added as shall not be inconsistent with or a waiver of

any of the provisions of the said standard policy relating to mortgage interests, but if so added, shall include the provisions of a standard rider or indorsement relating to such interest the form of which shall have been approved by the insurance commissioner and filed in his office as hereinafter provided;

(d) There may be added to the policy, with the approval of the insurance commissioner, any provision which any company issuing a policy is required by law to insert in its policies, not in conflict wth the provisions of such "standard fire insurance policy." All such provisions shall be printed in a group apart from the other provisions, agreements or conditions of the policy under separate title as follows: "Provisions required by law to be stated in this policy";

(e) If the policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations may, with the approval of the insurance commissioner, be written or printed upon, attached or appended to the policy, upon the third page of such standard policy, but shall be preceded by the words "This policy is issued by a mutual company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance of which the following shall apply to and form a part of this policy";

(f) Contracts for temporary insurance may be made for a period not exceeding fifteen days, which shall be deemed to include all of the provisions of the standard policy with such agreements and riders in writing added thereto as may be necessary to effect valid insurance of the described property and such other agreements not incon-